

WATER SUPPLY PLANNING OPPORTUNITIES: EXEMPT INTERBASIN TRANSFERS

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The arrival of a new year presents opportunities for water utilities to take stock of their current supplies and their ability to lawfully and most efficiently use those supplies within their current and future service areas, and bearing in mind their existing and projected water supply needs. The recent drought is an important reminder that there remain many water supply challenges across our state that cannot be solved by short-term rains or the current El Niño weather pattern. One important proactive planning tool that can be employed is a comprehensive assessment of a utility's current sources of water, so as to ensure that supplies may be lawfully used to address current and projected water demands. Attorneys in the Firm's Water Practice Group routinely review our clients' portfolios of supplies as part of such a comprehensive assessment and in light of long-term water supply planning.

In evaluating a utility's lawful rights to use water, one issue that is often the subject of confusion is the geographic service area limit that may be imposed in either a state-issued surface water right or a groundwater conservation district's production permit. While "place of use" limitations are not always included in water rights authorizations, when they are applicable it is important for utilities to understand such limitations and comply with them. One significant constraint that has been the subject of significant conflict over the last one hundred years involves the use of surface water supplies within the geographic limits of the basin in which the supplies are located (the "basin of origin"). Without explicit authorization from the state, no surface water right holder may divert such supplies outside of the basin of origin. Such authorizations, referred to as "interbasin transfer" rights, have been the subject of much debate at the Texas Capitol and the source of significant litigation in the courts. Indeed, the interbasin transfer statute, Water Code § 11.085, was substantively amended in 1997 via the Legislature's enactment of Senate Bill 1, to significantly increase the burden on applicants seeking interbasin transfer permits.

While securing a post-Senate Bill 1 interbasin transfer ("IBT") authorization comes with a host of significant legal and technical challenges, the Texas Legislature has thankfully afforded a few useful exceptions to the Water Code's IBT permitting requirements. These exceptions can be employed by utilities to provide surface water supplies to areas that may be located outside of the surface water right's basin of origin. Specifically, an exempt IBT provides a relatively quick and cost-efficient option to allow a utility to plan now in order to serve future demands in projected growth areas that may be geographically located across a river basin boundary.

Exempt IBTs are specifically authorized under § 11.085(v) of the Texas Water Code. Section 11.085(v) includes a menu of options that, if applicable and utilized, can avoid the burdensome requirements for extensive application details, broad and expensive notice, public meetings, evidentiary hearings, and evidence of heightened water conservation implementation, among other requirements that apply to non-exempt IBTs. Significantly, exempt IBTs also escape the application of the "junior rights" provision of § 11.085, such that an existing water right proposed to be transferred outside the basin of origin pursuant to an exempt IBT retains its original priority date.

Several exempt IBT categories are available under the statute. Section 11.085(v)(1) allows the transfer of not more than 3,000 acre-feet of water per year, in combination with other transfers authorized under the same water right. In addition, applicants may use § 11.085(v)(3) to transfer water from the water right's basin of origin into that basin's adjacent coastal basin. For regional water suppliers whose existing and future service areas may straddle river basin boundaries, § 11.085(v)(4) allows transfers within the entire retail service area of that utility, as well as to the geographic areas of a county or municipality that fall outside of the basin of origin. Emergency transfers and transfers of water imported into the state are also permitted as exempt IBTs under §§ 11.085(v)(2) and 11.085(v)(5), respectively.

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One or more of these options may prove helpful in meeting growing water supply needs in the coming years, particularly for potential customers with relatively modest annual demands (less than 3,000 acre-feet per year), utilities located near river basin boundaries (either in a retail service area or by county/municipal geographical limits), or those utilities that may wish to meet demands in one of Texas' eight coastal basins. Further, an applicant may seek an exempt IBT on the basis of several of these options in the same application, as may be applicable to an applicant's particular circumstances.

The value of exempt IBTs extends to both time investment and risk of protest, and the expense and delays that accompany same. Exempt IBT applications may be prepared and processed within a short period, making them attractive "low-hanging fruit" planning tools. In addition to being exempt from the significant substantive IBT requirements of § 11.085(b)-(u), the courts have ruled that applications for exempt IBTs do not require notice or the opportunity for a contested case hearing.

The year ahead will undoubtedly present time-intensive water supply challenges, lengthy permitting processes, and unique legal hurdles for many water utilities across the state. Contrasted against these realities, an exempt IBT may provide an efficient, low-risk solution to supply water – or to position a utility to supply water – to meet demands that may fall outside of the utility's authorized service area. As the new year gets underway, water suppliers may wish to take advantage of one or more of these available vehicles, as the use of such a proactive effort now may avoid the need for more reactive approaches down the road. Future editions of *The Lone Star Current* will address other matters that should be considered by water utilities in assessing the adequacy of their water supplies, and particularly in light of their current and projected water demands.

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